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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 485

PERRY HALSETH, INDIVIDUALLY AND TRADING AS PERRY SALES COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The Court of Appeals for the Seventh Circuit affirmed and enforced the order of the Federal Trade Commission without opinion. The decision and order of the Commission are printed at Pet. 20–27.

JURISDICTION

The decision of the court of appeals was rendered on September 15, 1954 (Pet. 28), rehearing

was denied on October 26, 1954 (Pet. 29), and a final decree was entered on November 1, 1954 (Pet. 30–31). The petition for a writ of certiorari was filed on December 14, 1954. Jurisdiction is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether petitioner's method of doing business—distributing merchandise to solicited representatives throughout the United States, together with "push-card" devices prepared and designed to enable the representatives to sell the items of merchandise by lottery—is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The essential facts, as found by the Commission after full hearing, may be summarized as follows:

Petitioner is engaged in selling cameras, radios, pens, dolls, cutlery, and bedspreads through representatives located in all parts of the United States. These representatives are solicited by advertising material which petitioner sends through the mails in great quantities. The advertising packet consists, *inter alia,* of a circular describing various articles of merchandise offered, a "push-card" device, and an order blank. The recipient is advised that the "push-card" may be utilized to obtain the advertised articles as premiums, while giving an opportunity to "friends, neighbors and co-workers" to obtain the merchandise "for as little as 1¢ and not more than 39¢."

The typical "push-card" pictures the item of merchandise involved and holds thirty perforated disks, each bearing a feminine name and each concealing a number determinative of the cost of each draw. A patron drawing a number between 1 and 39 is charged the amount in cents of the number drawn; if the number is over 39, the cost is 39¢. Certain numbers entitle the drawer to the prize of a ballpoint fountain pen. A master seal on the card conceals the "lucky name" (one of the feminine names on the disks) entitling the holder of the corresponding disk to the merchandise prize. These devices, when employed

in conformity with petitioner's instructions, result in the conduct of a game of chance, gift enterprise or lottery scheme. They have been used in this manner by a substantial number of persons engaged in distributing petitioner's merchandise. (Pet. 11–15.)

On the basis of these facts, the Commission concluded that petitioner was engaging in unfair acts and practices within Section 5 of the Federal Trade Commission Act, and issued a cease and desist order (Pet. 26–27). On petition to review, the court of appeals affirmed the order and directed its enforcement (Pet. 30–31).

ARGUMENT

Federal Trade Commission v. *Keppel and Bro., Inc.*, 291 U. S. 304, established that it is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act to use a selling scheme under which the purchaser's payment or the return which he receives depends upon chance.[1] This doctrine has been applied by the courts of appeals in a wide variety of situations which have in common the use of a device designed to promote sales through appeal to customers' gambling instincts.[2] Patently, there is nothing to

[1] Petitioner's "push-cards," as noted above, make both payment and return a gamble.

[2] *Minter* v. *Federal Trade Commission*, 102 F. 2d 69 (C. A. 3); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 192 F. 2d 444 (C. A. 3); *Consolidated Manufacturing Co.* v. *Federal Trade Commission*, 199 F. 2d 417 (C. A. 4); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C. A. 5);

distinguish petitioner's scheme from the schemes and devices proscribed in numerous predecessor cases.

Chas. A. Brewer & Sons v. *Federal Trade Commission*, 158 F. 2d 74 (C. A. 6); *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C. A. 7), certiorari denied, 299 U. S. 557; *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910 (C. A. 7), certiorari denied, 299 U. S. 590; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689 (C. A. 7), certiorari denied, 302 U. S. 753; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C. A. 7), certiorari denied, 308 U. S. 610; *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64 (C. A. 7), certiorari denied, 317 U. S. 683; *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C. A. 7), certiorari denied, 321 U. S. 791; *Johnson Candy Co.* v. *Federal Trade Commission*, 78 F. 2d 717 (C. A. 7); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351 (C. A. 7); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564 (C. A. 7); *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C. A. 8), certiorari denied, 301 U. S. 691; *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C. A. 8); *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519 (C. A. 8); *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C. A. 9), certiorari denied, 344 U. S. 819; *Feitler* v. *Federal Trade Commission*, 201 F. 2d 790 (C. A. 9), certiorari denied, 346 U. S. 814; *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C. A. 9); *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C. A. 9); *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (C. A. 9); *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (C. A. 10), certiorari denied, 309 U. S. 675; *Universal Manufacturing Co.* v. *Federal Trade Commission*, 204 F. 2d 272 (C. A. 10), certiorari denied, 346 U. S. 856; *Gay Games, Inc.* v. *Federal Trade Commission*, 204 F. 2d 197 (C. A. 10); *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, 204 F. 2d 737 (C. A. D. C.), certiorari denied, 346 U. S. 830; *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C. A. D. C.); *Seymour Sales Co.* v. *Federal Trade Commission* (C. A. D. C., November 26, 1954), pending on petition for certiorari, No. 484, this Term.

Petitioner argues, however, that the Commission is precluded from applying the doctrine of the *Keppel* case in this instance because of *United States* v. *Halseth,* 342 U. S. 277, which held that petitioner's distribution of the advertising material containing the "push-card" device did not violate the criminal statute (18 U. S. C. 1302) prohibiting the mailing of matter "concerning any lottery, gift enterprise, or similar screme."[3]

But that decision held that the original act of mailing the advertising material did not violate the criminal statute since the statute applied only to an "existing, going lottery or gambling scheme," and the "lottery or scheme would come into existence only if the addressee put the paraphernalia into operation." 342 U. S. at 280–281. Whether the initial act of petitioner in setting the scheme in operation violates a criminal statute is immaterial. This Court ruled in the *Keppel* case that the sale of merchandise by offering it to the public on a gambling basis is "unfair" within the meaning of the Federal Trade Commission Act, irrespective of whether particular acts involved in such conduct come within the "criminal statutes imposing penalties on gambling, lotteries and the like." 291 U. S. at 313.

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[3] The same contention was advanced in the petition filed with this Court in the *U. S. Printing & Novelty Co., Inc.*, case, *supra* (Oct. Term, 1953, No. 273) and is made by petitioner in No. 484, this Term. And see the court of appeals' opinion in the *Lichtenstein* case, *supra*, 194 F. 2d at 610–611.

Congress, moreover, has approved the ruling in *Keppel* in taking pains to make clear that the Commission's power to deal with merchandising-through-gambling schemes is unaffected by criminal statutes which relate to gambling. Thus, in 1951, when Congress forbade the interstate transportation of slot machines and certain other mechanical devices suitable for gambling to states in which gambling is illegal (15 U. S. C. 1171 *et seq.*), it added the proviso (15 U. S. C. 1172): "Nothing in this act shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act." The Senate Report, explaining this provision, states (S. Rep. No. 1482, 81st Cong., 2d Sess., p. 4): "A saving clause is included in this section to avoid any misunderstanding that the act, and particularly the provision in section 2 permitting unbroken transportation of gambling devices into States where their use is legal, interferes with or reduces the authority which the Federal Trade Commission has exerted under section 5 of its constituent act (15 U. S. C. 45) to exclude from the channels of interstate commerce gambling devices to be used in the sale or distribution of merchandise to the public, *Federal Trade Commission* v. *R. F. Keppel & Bros., Inc.*, 291 U. S. 304; *Charles A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74."

To similar effect, see H. Rep. No. 2769, 81st Cong., 2d Sess., pp. 9–10. See, also, *Lichtenstein v. Federal Trade Commission, supra,* 194 F. 2d at 610–611.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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